MOO NG

v.

KIWI PRODUCTS SDN BHD JOHOR & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[NOTICE OF MOTION NO: 25-21-1997]
30 JUNE 1998

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Decision of tribunal/Industrial Court - Whether an appeal - Whether only a review of decision-making process - Whether High Court may review decision itself on merit of facts*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Nature and scope of remedy - Whether entirely discretionary - Whether jurisdiction of High Court to issue certiorari purely supervisory - When will certiorari be refused*

LABOUR LAW: *Employment - Constructive dismissal - Nature and scope of doctrine - Whether a mere label - Whether should be used - Whether doctrine based on contract - Proof of constructive dismissal - Whether secondment a pretext for unilateral transfer of employment - Consideration of Amanah Butler (M) Sdn Bhd v. Yike Chee Wah*

This was an application by notice of motion by the applicant for an order of *certiorari* to quash an award of the Industrial Court.

The second respondent bought over the business of the first respondent in February 1993. Under the sale agreement, all the employees of the first respondent including the applicant were offered continued employment by the second respondent on terms and conditions not less favourable than those they last enjoyed with the first respondent.

The applicant was initially appointed as a factory supervisor in the first respondent and was subsequently promoted to production controller and then to production manager and later to warehouse and distribution manager. In August 1992, the applicant was assigned to work with the second respondent to assist in its start-up operations. The applicant commenced his assignment with the second respondent as its warehouse and distribution manager for six and a half months, without any objection or protest. Subsequently, the applicant was offered employment as a warehouse and distribution manager with the second respondent on terms and conditions no less favourable than those he last enjoyed with the first respondent.

In March 1993 however, the first respondent was informed by the applicant that he did not accept the proposed transfer of employment to the second respondent. The first respondent was then informed that the applicant had deemed himself to be constructively dismissed. The applicant claimed that his assignment/secondment was a pretext for the unilateral transfer of employment.

Held:

[1] A judicial review of a decision of the Industrial Court is **not** an appeal but a review of the manner in which the decision was made. The High Court is **not** entitled, on an application for judicial review, to consider whether the decision of the Industrial Court itself, on the merits of the facts, was fair and reasonable.

[2] *Certiorari* is expanding in its scope. Not only can *certiorari* issue and be issued to a body discharging a quasi-judicial function, it can even extend to any body which determines the rights of the people. *Certiorari* has been invoked to quash the discretionary decisions of Ministers and other administrative authorities.

[2a] *Certiorari* is entirely a discretionary remedy of the High Court. The High Court will simply refuse to issue *certiorari* if the applicant has suffered no real injustice, or if the applicant lacks merit or if the applicant has failed to disclose relevant facts. The jurisdiction of the High Court to issue *certiorari* or order prohibition is entirely supervisory; it is **not** appellate or revisional in its jurisdiction. The High Court in exercising its discretionary power, exercises it in its original jurisdiction.

[3] The doctrine of constructive dismissal is **not** a mere label coined to benefit the employee in an industrial dispute. It is a doctrine that gives life to the employee who has been dismissed without just cause or excuse. It has existed since time immemorial and has been adopted in established cases. The doctrine hinges on the contract test. It occurs when an employer repudiates a contract of employment. The repudiation may take the form of a breach, an anticipatory breach or a notice of intention. It may be express or implied and it must go to the substance of the contract.

[3a] If an employee asserts that he has been constructively dismissed, he must establish that there has been some conduct on the part of the employer which breach an express or implied term of the contract of employment going to its very root. A term which may be implied in a contract of employment is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract.

[3b] In this case, the applicant was blowing hot and cold. On the one hand he alleged that the first respondent remained as his employer during his assignment as warehouse and distribution manager to the second respondent – but on the other hand, at the end of his secondment and at the time when the second respondent had bought over the first respondent and offered him the post of warehouse and distribution manager, the applicant rejected the *bona fide* offer on the sole ground that he should be offered the position of production manager notwithstanding the fact that he no longer enjoyed that position in the first respondent.

[4] The second respondent made a genuine offer to all the employees of the first respondent including the applicant. The offer to the applicant took into account the salient factors, namely: (i) that the applicant's last position with the first respondent prior to his secondment was as warehouse and distribution manager; and (ii) that the applicant had the requisite qualification as he had served in that capacity for over six and a half months.

[4a] The applicant had remained in his capacity as warehouse and distribution manager on a higher scale without a whimper of objection for over six months. This conduct would vitiate any claim the applicant might have against both respondents.

[4b] The applicant had failed to discharge the burden of proving that he had been constructively dismissed and the Industrial Court was correct in dismissing the his claim.

[5] Assuming that there had been a breach by the respondents, the applicant's delay of six and a half months as conceded by him was tantamount to an affirmation of the alleged breach.

[Application dismissed.]

Cases referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***

Ang Beng Teik v. Pan Global Textiles Bhd, Penang [1996] 4 CLJ 313 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935 ***(foll)***

Farquhar Butler Brothers Supplies Ltd 23 BCLR (2d) 89 ***(foll)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(foll)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan, Malaysia [1996] 4 CLJ 687 ***(foll)***

Hong Kong & Shanghai Banking Corp v. Rent Tribunal for Ulu Kinta [1972] 1 MLJ 70 ***(refd)***
Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers & Anor [1984] 2 CLJ 6 ***(refd)***
Lesiuk v. British Columbia Forest Products Ltd [1986] 15 CCEL 91 ***(refd)***
MPH Bookstores Sdn Bhd v. Lim Jit Seng [1987] ILR June 585 ***(foll)***
Nicholls v. Air Products Canada Ltd [1991] Rep Oct 1109 ***(foll)***
Non-Metallic Mineral Products Mfg Employees Union v. South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67 ***(foll)***
North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***
O' Reilly v. Mackman [1982] 3 All ER 1124 ***(refd)***
Orth v. Mac Donald Dettwiler & Assoc Ltd [1986] 16 CCEL 41 ***(refd)***
Pexxon Sdn Bhd v. Sia Qui Yau, Johore [1989] 1 ILR August 235 ***(foll)***
R v. Hillingdon [1974] 2 All ER 653 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Re Application by the Union Omnibus Co Sdn Bhd [1977] 2 MLJ 260 ***(refd)***
Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union [1995] 2 CLJ 748 ***(foll)***
Tan Yook Tian (f) v. District Officer [1987] 1 CLJ 73 ***(refd)***
Tuan Hj Sarip & Anor v. Patco Malaysia Bhd [1991] 1 SCR 390 ***(cit)***
Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products [1991] 1 CLJ 552 ***(cit)***
Western Excavating (ECC) Ltd v. Sharp [1978] 1 All ER 713 ***(foll)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 ***(foll)***

For the applicant - Gana Muthusamy; M/s Gana Muthusamy & Co
For the 2nd respondent - Thavalingam Thavarajah; M/s Shearn Delamore & Co

Reported by Mariette Peters-Goh & Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

This was an application by way of a Notice of Motion in encl. 2 by the applicant for an order of *certiorari* to remove into this court for the purpose of quashing the Industrial Court award number 35 of 1997 that was made on 23 January 1997. A judicial review by way of a *certiorari* must be the best remedy available to the applicant. A judicial review is not an appeal from the decision of the Industrial Court but rather it is a review of the manner in which the decision was made. This court is not entitled on an application for judicial review to consider whether the decision of the Industrial Court itself, on the merits of the facts, was fair and reasonable. I draw support for my views on the prevailing law by reference to passages in the judgments of Lord Hailsham of St. Marylebone L.C. and Lord Brightman in the case of Chief Constable of the *North Wales Police v. Evans* [1982] 3 All ER 141. Lord Hailsham of St. Marylebone L.C. at pp. 143 to 144 of the judgment succinctly said:

> This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.
>
> Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning M.R. (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts *carte blanche* to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. I am not sure whether Lord Denning M.R. really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to submitting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.

Lord Brightman had this to say at p. 154 of the judgment:

> I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of *Lord Evershed* [1963] 2 All ER 66 at 91, [1964] AC 40 at 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to:
>
> > a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review, it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.
>
> I leave these preliminary observations in order to consider the judgments in the Court of Appeal. It was accepted by each member of the court that the case fell within the third of Lord Reid's categories, that the respondent was entitled to a fair hearing; and that he had not had one. However, Lord Denning M.R. added this: I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable. That is the protection afforded to every servant who is employed under a contract of service. He is protected against unfair dismissal. No less protection should be afforded to a probationer ... It is my opinion that the chief constable was not justified in dispensing with the services of Constable Evans or in requiring him to resign.

And at p. 155, Lord Brightman continued in these words:

> There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that 'Not only must (the probationer constable) be given a fair hearing, but the decision itself be fair and reasonable. If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself.

Today, *certiorari* is expanding in its scope. Recognising the need to impose judicial review over administrative bodies the courts have expanded the parameters of *certiorari*. Not only can *certiorari* issue and be issued to a body discharging a quasi-judicial function, it can even extend to any body who determines the rights of the people: *R v. Hillingdon* [1974] 2 All ER 653. *Certiorari* has been invoked to quash the discretionary decisions of Ministers and other administrative authorities (*Tan Yook Tian (f) v. District Officer* [1987] 1 CLJ 73; *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935 at 953; and *O'Reilly v. Mackman* [1982] 3 All ER 1124). Simply put *certiorari* is to quash. *Certiorari* is entirely a discretionary remedy of the High Court – it is extraordinary. The High Court will simply refuse to issue *certiorari* if the applicant has suffered no real injustice, or the application lacks real merit, or for that matter if the applicant has failed to disclose relevant facts (*Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products* [1991] 2 MLJ 115). Recently the Court of Appeal in *Hoh Kiang Ngan v. Mahkamah*

Perusahaan, Malaysia [1995] 3 MLJ 368, 393 ruled that the power of the High Court to order prohibition is purely discretionary and the High Court does not exercise this jurisdiction unless substantial injustice has ensued or is likely to ensue. The Court of Appeal also held that the High Court should not allow itself to be turned into an appellate court to revise and set right mere errors of law which do not occasion an injustice in a broad and general sense. In other words, the jurisdiction of the High Court to issue *certiorari* or order prohibition is entirely supervisory; it is not appellate or revisional in its jurisdiction. It is a correct statement of the law to say that the High Court in exercising its discretionary power, exercises it in its original jurisdiction. In *Non-Metallic Mineral Products Mfg Employees Union v. South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67, the High Court emphasised the significance of this original jurisdiction in these words:

> The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore, the jurisdiction may for convenience be described as an extraordinary original jurisdiction.

As I said, this court will not act as a Court of Appeal and as a review court it will not go into the merits of the case (*Tuan Haji Sarip & Anor v. Patco Malaysia Bhd* [1991] 1 SCR 390). This court too will not review evidence or substitute its own findings of fact for that of the tribunal. Of crucial importance it must be emphasised that *certiorari* should not be used by way of a disguised appeal from findings of fact by an adjudicatory body. In *Re Application by the Union Omnibus Co. Sdn Bhd* [1977] 2 MLJ 260, the High Court refused to issue *certiorari* to quash an award of the Industrial Court because there was no failure of natural justice or excess of jurisdiction or any error of law apparent on the face of the record. George Seah FJ (as he then was) had occasion to say something about *certiorari* in *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers & Anor* [1984] 1 MLJ 363, 371 in these words:

> In the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. Clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise, review for jurisdictional error will be equivalent to review on merit.

In *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 1 MLJ 417, 421 the then Supreme Court said bluntly that "it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute *'de novo'* and decide it on its merits."

Hong Kong & Shanghai Banking Corporation v. Rent Tribunal for Ulu Kinta [1972] 1 MLJ 70 was a case where the decision of the Rent Tribunal was challenged on the ground that, having regard to the evidence, the findings of fact by the tribunal were said not to be justifiable. The then Federal Court rejected this contention and refused to issue *certiorari.* Ong CJ (as he then was) said:

> *Certiorari* would lie where the Rent Tribunal had acted without or in excess of jurisdiction, or again where there was an error of law. Findings or conclusions of fact alleged to be erroneous are not open to correction by way of *certiorari* – save that, where there are no facts to support a conclusion presumably based on evidence, then the error will be an error of law.

Again in regard to findings of fact by the Industrial Court, the then Federal Court observed in *Non-Metallic Mineral Products Manufacturing Employees Union v. South East Asia Fire Bricks Sdn Bhd (supra),* particularly at p. 69 of the judgment:

> That tribunal was charged with findings of fact, and, unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of fact.

I venture to say that the function of the Industrial Court is to weigh and assess the evidence of the witnesses and that function is not the function of the High Court.

Now, with these broad principles in mind, I shall now proceed to examine encl. 2.

The salient facts within a narrow compass may be stated as follows. The second respondent, Kiwi Manufacturing Sdn Bhd, in a business venture bought over the business of the first respondent, Kiwi Products Sdn Bhd Johor, by way of a business sale agreement and assignment dated 19 February 1993 ("sale agreement"). Under that sale agreement all the employees of the first respondent including the applicant were magnanimously offered continued employment by the second respondent on terms and conditions no less favourable than they last enjoyed with the first respondent. The applicant was initially appointed, in the first respondent, to the position of factory supervisor at a salary of RM200. By letter dated 11 April 1974, the applicant was appointed as a production controller as from 15 April 1974 at a salary of RM525. Later, on or about 1 September 1981, the applicant was promoted to the post of production manager at a salary of RM1,550. During the applicant's tenure as a production manager with the first respondent he was responsible for:

(1) production;

(2) processing of all administrative documents relating to Government departments;

(3) overall control of store;

(4) shipment/delivery;

(5) welfare of employees including all administrative works; and

(6) purchasing of materials.

By letter dated 20 August 1992 the applicant was promoted by the first respondent w.e.f. 1 July 1992 to the post of warehouse and distribution manager at a salary of RM3,800 per month. At exh. "MN 8" of p. 59 of encl. 5 it was intimated that a further review of the applicant's salary may be made on 1 January 1993 subject to certain conditions which generally relate to the betterment and improvement of the warehousing facilities by the applicant. By letter dated 20 August 1992 the applicant was assigned to work with the second respondent commencing 22 August 1992 to assist in its start-up operations. That letter can be seen in exh. "MN 8" at p. 58 of encl. 5 and it was worded thus:

KIWI PRODUCTS SENDIRIAN BERHAD
A Sara Lee / DE Company

13-J, Jalan Bakti, Larkin Industrial
Estate,
80350 Johor Baru, Johor Malaysia.
Telephone: 07-371594, 07-373017
Cable: KIWI Singapore Telex: RS 24497
Fax: 65-7600789

20 August 1992 **BY HAND**

Mr. Peter Moo,
185, Jalan Sutera,
Taman Sentosa,
80150 Johor Bahru,
Johor.

Dear Mr. Foo,

ASSIGNMENT TO KIWI MANUFACTURING SDN BHD

We have been requested by Sara Lee Kiwi Holdings Incorporated to assist in the start-up operations of our related company. Kiwi Manufacturing Sdn. Bhd. in Kawasan Tampoi, Johor Bahru. In line with this request, you will be assigned to perform duties there for a period of six (6) months commencing 22nd August 1992.

Your duties in Kiwi Manufacturing Sdn. Bhd. will remain the same as in Kiwi Products Sdn. Bhd and you will report to Mr. P. Gopinath, our Operations & Works Manager.

OTHER MATTERS

Transport to and fro will be provided from Kiwi Products Sdn. Bhd. premises to Kiwi Manufacturing Sdn Bhd.

Meals will be provided at the canteen free of charge. If you are required to work overtime, meal allowances will be paid accordingly.

If you wish to discuss the above assignment further, please contact Mr. P. Gopinath or me.

Yours sincerely
KIWI PRODUCTS SDN BHD

Sgd (Illegible)
OOI HUN CHUAN
Finance & Administration Manager

The applicant dutifully commenced his assignment with the second respondent as its warehouse and distribution manager without any objection or protest, be it oral or written, for some 6½ months. By letter dated 19 February 1993, the second respondent informed the applicant of their purchase of the business of manufacturing and sale of shoe care, household and industrial products from the first respondent. Naturally, the applicant was offered employment as warehouse and distribution manager with the second respondent on terms and conditions no less favourable than those he last enjoyed with the first respondent. The letter dated 19 February 1993 can be seen at exh. "MN 11" at p. 66 of encl. 5 and it was worded in this way:

Kiwi Manufacturing Sdn Bhd
A Sara Lee / DE Company

No. 8, Jalan Hasil,
Kawasan Tampoi,
81200 Johor Bahru,
Johor, Malaysia.
Tel: 07-381622
Fax: 07-381630
19 February 1993

Moo Ng,
185, Jalan Sutera,
Taman Sentosa,
80150 Johor Bahru,
Johor.

Dear Peter,

We have purchased the business of manufacturing and sale of shoe care, household and industrial products from Kiwi Products Sdn. Bhd. with effect from 19th February 1993.

We have pleasure in making you this offer of employment as a Warehouse and Distribution Manager on the terms and conditions no less favourable than those you last enjoyed with Kiwi Products Sdn. Bhd.

Your employment with us shall commence as soon as you sign your acceptance of the offer as set out in this letter but we will deem your years of service with Kiwi Products Sdn. Bhd. as years of service with us.

If the terms and conditions are acceptable, please sign your acceptance thereof on the duplicate copy of this letter and return the same to us.

(If we do not receive your acceptance by 8th March 1993, this offer of employment would be treated as lapse on 8th March 1993).

Yours sincerely
KIWI MANUFACTURING SDN. BHD.

Sgd (Illegible)
P. GOPINATH
Operations & Works Manager

/rtsp

****

I, Moo Mg, hereby acknowledge that I have read and I accept the terms and conditions of employment as outlined above.

... ...

Date Signature

By letter dated 5 March 1993, some two weeks later, the first respondent received a letter from the applicant's solicitors, the contents of which were, to say the least, so brief and it merely stated that the applicant did not accept the proposed transfer of employment to the second defendant and that letter was marked as exh. "MN 12" of encl. 5 at p. 68 thereof and for convenience it is reproduced below:

5/3/93

GM/lin/LAB 21/93

M/S Kiwi Products Sdn Bhd,
No. 8, Jalan Hasil,
Kawasan Tampoi,
81200 Johor Bahru,
Johor. FAX/HAND

Dear Sirs,

SALE OF BUSINESS

We act for Mr. Moo Ng of No. 185, Jalan Sutera, Taman Sentosa, 80150 Johor Bahru, Johore and we have been handed over your letter dated 19 February 1993 with instructions to reply thereto.

Our client does not accept the proposed transfer of employment to M/S Kiwi Manufacturing Sdn Bhd.

In the circumstances we are instructed by our client to ascertain the last working day for our client in the event you intend to cease business altogether and therefore unable or unwilling to sustain our client's employment. This request is without prejudice to our client's rights and remedies that may be available to him in law in the event of cessation of your business.

Yours faithfully,

Sgd (Illegible)
GANA MUTHUSAMY

c.c. Client

We enclose herewith our official receipt no: 1412 for your retention.

Perhaps it is not out of place to emphasise and stress a very important fact. That fact is this. All the other employees of the first respondent with the exception of the applicant accepted willingly the transfer of employment to the second respondent. This was indeed a wise choice.

By letter dated 15 March 1993, some ten days later, the applicant's solicitors wrote a letter to the first respondent relaying the message that the applicant had deemed himself to be constructively dismissed. That letter was marked as exh. "MN 13" at pp. 70 and 71 of encl. 5 and it makes for interesting reading. It was worded thus:

15/3/93

GM/lin/LAB 21/93

M/S Kiwi Products Sdn Bhd,
No. 8, Jalan Hasil,
Kawasan Tampoi,
81200 Johor Bahru,
Johore.

Dear Sirs,

SALE OF BUSSINESS

We refer to the above and to our letter dated 5 March 1993 to which we regret to note you have not responded.

Our client had been compelled to work at the factory site of M/S Kiwi Manufacturing Sdn Bhd on the pretext of secondment with effect from 22 August 1992. This was communicated to our client *vide* your letter dated 20 August 1992. On the same day our client's designation as Production Manager was unilaterally and without consent of our client was changed to Warehouse and Distribution Manager and such designation to take effect retrospectively from 1 July 1992.

On or about 19 February 1993, our client received 2 notifications one from you and the other from M/S Kiwi Manufacturing Sdn Bhd. Our client was offered the post of Warehouse and Distribution Manager supposedly on terms and conditions no less favourable than that enjoyed by him under Kiwi Products Sdn Bhd.

It is our client's view that the whole exercise of secondment, pretended promotion as a Warehouse and Distribution Manager and subsequent offer of employment by M/S Kiwi Manufacturing Sdn Bhd, *inter alia,* is a sham and a camouflage intended to demote our client from the post of Production Manager to Warehouse and Distribution Manager.

As you have sold the business of the company to M/S Kiwi Manufacturing Sdn Bhd with effect from 19 February 1993 and for all intents and purposes being the legitimate successor-in-title of your company M/S Kiwi Manufacturing Sdn Bhd have been unable to offer to our client terms and conditions no less favourable than that enjoyed by him under your company. Our client is treating such failure as a fundamental breach of Contract by your Company entitling him to accept such repudiation and to treat himself as constructively dismissed.

In the circumstances, our client wishes to notify you that, he will not be reporting for work at the factory site of M/S Kiwi Manufacturing Sdn Bhd from 15 March 1993 onwards. Our client has already given oral notification of the same to your Finance and Administration Manager this morning. Kindly be guided accordingly.

Yours faithfully,

Sgd (Illegible)
GANA MUTHUSAMY

c.c. Client.

Sgd (Illegible)
15/3/93
KIWI PRODUCTS SENDIRIAN
BERHAD.

The first respondent acted swiftly and refuted the contents or the above letter by sending a letter through their solicitors addressed to the applicant's solicitors. That letter was dated 17 March 1993 and marked as exh. "MN 14" of encl. 5 at p. 73 thereof and it was couched in the following manner:

SHEARN DELAMORE & Co
Peguambela dan Peguamcara, Notari Awam,
Pesuruhjaya Sumpah, Ejen Paten Berdaftar &
Ejen Cap Dagangan
Advocates & Solicitors, Notary Public,
Commissioner for Oaths, Registered Patent &
Trade Mark Agents

Rujukan Kami/Our Ref: SD 1423003 (TV)

17th March 1993

PRIVATE & CONFIDENTIAL

MESSRS. GANA MUTHUSAMY & CO,
Advocates & Solicitors, **BY FAX/POST**
Room 504, 5th Floor,
Wisma Peladang,
(Next to Malayan Banking),
Jalan Selat Tebrau,
80000 JOHOR BAHRU.

Attention: Mr. Gana Muthusamy

Dear Sir,

RE : SALE OF BUSINESS

We refer to the above matter and are instructed by our clients Kiwi Products Sdn Bhd to reply your letters dated 5th March and 15th March 1993 regarding the same.

As you are aware our clients have ceased operations and the business was sold to Kiwi Manufacturing Sdn Bhd with effect 19th February 1993.

We are instructed that your client was offered employment with Kiwi Manufacturing *vide* a letter dated 19th February 1993 as Warehouse and Distribution Manager a position he held whilst on secondment from Kiwi Products from 21st August 1992 without any protest whatsoever, on terms and conditions no less favourable than that enjoyed during his tenure with our clients.

Our clients' are surprised to note that your client now claims that he deems himself constructively dismissed by virtue of the aforesaid sale which we are instructed was *bona fide* and hereby deny your client's contention as per the contents of your letter dated 15th March 1993.

In view of the above our clients hereby request the return of all company property in the current possession of your client within 14 day's hereof failing which they will have no alternative but to resort to legal proceedings to recover the same.

Yours faithfully,

Sgd (Illegible)

/sr

c.c. Clients.

What is this doctrine of constructive dismissal? Lord Denning MR in *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 All ER 713 applied the contract test when considering the doctrine and laid down the law as follows (see p. 717 of the judgment):

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

In considering the doctrine of constructive dismissal, his Lordship had to consider the facts of that case and his Lordship narrate those facts in this way (see pp. 715 and 716 of the judgment):

> Mr. Sharp was only employed by the China Clay Co for 20 months. He left of his own accord. Yet he has been awarded 658 pound as compensation for unfair dismissal. There seems something wrong about that award. What it is? To fill in the details, he started work with the company on 9th July 1974. One of the terms was that, if he worked extra time, he could have time off *in lieu.* One day in February 1976 he wanted to play a card game for a team. He asked the foreman for three hours off. The foreman said that he could not have it that afternoon as there was a lot of work to be done. But Mr. Sharp took it off and played his game of cards. Next morning, Friday, 27th February 1976, the foreman dismissed him, giving him two weeks' notice for failing to carry out a reasonable order. He appealed to a panel set up by the company under its disciplinary procedure. On 5th March 1976 the panel allowed his appeal, saying:
>
> > Having considered all the evidence presented to us, we are of the unanimous decision that the Dismissal be withdrawn, as there was room for confusion the way the situation was left, but having regard to the seriousness of what has happened, we substitute the Dismissal with five working days suspension without pay.
>
> Thus he lost five days' pay. He does not dispute the justice of the panel's decision. But it left him in financial difficulties. He was living with a woman who was, in modern terminology, his 'common law wife' and their two children. His take-home pay was 42.40 pound a week. He had no savings, but he had holiday pay accrued to him of 117.17 pound net.

As a result of the five days' loss of pay, he had no money to pay his household expenses. He went to the social security and was given 6.45 pound. But that was not enough to carry on. So he went to his employers, the company. He asked for an advance on his accrued holiday pay. He was told, quite correctly, that it was against company policy to pay holiday pay unless the holiday was itself actually taken. He then asked for a loan. He said he wanted 40 pound. The welfare officer told him that the company could not make him a loan to that extent. The welfare officer suggested that Mr. Sharp should see him again to discuss the details. That did not satisfy Mr. Sharp. He said: 'If the company cannot help me, I must sort it out myself. I shall have to obtain my holiday pay.' That is just what he did. He went to see the workshop manager, and said: 'I don't want to leave, but circumstances force me to do so. I am leaving and want my holiday pay now.' So on 11th March 1976 he picked up his holiday pay of 117.17 pound and left. He went straight off to the industrial tribunal and claimed compensation for unfair dismissal.

The industrial tribunal were divided in opinion. Two of them thought Mr. Sharp should be compensated. He should be awarded 658 pound. They said that the company 'ought to have leant over backwards to help him'; and that the company's conduct 'justified Mr. Sharp in terminating his employment in order to obtain his accrued holiday pay and so meet his commitments'. The third member disagreed. He thought that Mr. Sharp ought to have talked to the welfare officer again. He held that Mr. Sharp's decision to resign was not caused or originated by any misconduct on the part of the company, but was solely his own personal decision. There had, therefore, been no dismissal whether constructive or otherwise.

The company appealed to the Employment Appeal Tribunal. They said significantly:

> '... if each one of us individually had been sitting on this industrial tribunal, we would have been minded to take the same view as that of the minority member.'

But they dismissed the company's appeal because they said they were –

> 'forced to the conclusion that it is impossible to say that this industrial tribunal went so badly wrong in law, or reached such a conclusion that no reasonable tribunal could have come to it.'

So Mr. Sharp (who left work of his own accord, because he was not granted a loan as to the full amount he asked) was awarded 658 pound compensation. It does seem strange. Especially as the industrial tribunal said:

> '... in finding against [the company] we imply no criticism of their general treatment of Mr. Sharp, or of their personnel administration and procedures as a whole. On the contrary, we consider all these aspects to have been quite excellent, and [the company] to have been good, responsible and careful employers ... We regard the events of 9th and 10th March as something exceptional.'

Finally, his Lordship concluded, as seen at p. 719, in this way:

> If the 'contract test' had been applied, the result would have been plain. There was no dismissal, constructive or otherwise, by the company. The company were not in breach at all. Nor had they repudiated the contract at all. Mr. Sharp left of his own accord without anything wrong done by the company. His claim should have been rejected. The decision against the company was most unjust to them. I would allow the appeal accordingly.

In *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 SC, Salleh Abas LP delivering the judgment of the then Supreme Court applied vigorously the case of *Western Excavating (ECC) Ltd v. Sharp (supra)* and his Lordship then traced the development of the law in England and remarked that (see pp. 94 to 95 of the judgment):

> In England where this expression originated, there had been a great deal of unsettled opinions amongst chairmen of industrial tribunals and also among judges who sat to hear appeals from those tribunals. According to the Court of Appeal in *Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27, it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situations, the employee is entitled to regard himself as being dismissed and walk out of his employment.
>
> Historically, the expression 'constructive dismissal' rose into great prominence in connection with the interpretation of several pieces of labour legislation passed by the U.K. Parliament. The first was the Redundancy Payment Act 1965 which was aimed at giving relief to employees who are dismissed on account of redundancy. Such employees are entitled to a compensation known as a redundancy payment. The second legislation was the Industrial Relations Act 1971. This Act introduced a concept of unfair dismissal in that it guaranteed to an employee protection against unfair dismissal by his employer. The third legislation was the Trade Union and Labour Relations Act 1974 which is a consolidation of the previous two pieces of legislation, ie, the 1965 Act and the 1971 Act. A further consolidation was effected by the Employment Protection Act 1978.

As to unfair dismissal, a provision is enacted in every one of these three pieces of legislation, ie, the 1971, 1974 and 1978 Acts, to the effect that an employee has the right not to be unfairly dismissed by his employer (see section 54(1) of the 1978 Act). The Acts also define 'dismissed' or 'dismissal' and lay down the criteria which would constitute fairness or unfairness of a dismissal (see the 1978 Act, section 55 as to 'dismissal' or 'dismissed' and section 57 as to fairness of dismissal). We are here only concerned with the definition of 'dismissed' or 'dismissal.' For this purpose, we reproduce here the relevant provision of section 55 of the 1978 Act as follows:

Meaning of unfair dismissal –

55 (1). In this Part, except as respects a case to which section 56 applies, 'dismissal' and 'dismiss' shall be construed in accordance with the following provisions of this section.

(2) Subject to subsection (3), an employee shall be treated as dismissed by his employer if, but only if, –

(a) ...

(b) ...

(c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.

It is in connection with the interpretation of paragraph (c) of subsection (2) that the doctrine of 'constructive dismissal' became currently used and gave rise to so much divergence of opinions until it was finally put to rest by the Court of Appeal in *Western Excavating's* case *(supra)*.

His Lordship Salleh Abas LP then continued to say at pp. 95 to 96 of the judgment:

The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression 'constructive dismissal' was used. It must be observed that paragraph (c) never used the words 'constructive dismissal.' This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought and a few decisions were made that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning

M.R., with whom the other two Lord Justices in the case of *Western Excavating (supra)* agreed, reiterated an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd.* [1969] 3 All ER 1126 and rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of paragraph (c) is a contract test. In his view, the Act draws a distinction between 'dismissal', which is in one section, and 'unfairness', which is in another section, and moreover the paragraph is using legal connotations, such as the words 'notice' and 'entitled.'

Thus it is clear that even in England, 'constructive dismissal' does not mean that an employee can automatically terminate the contract when his employer' acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier, and goes no further. Alternative expressions with the same meaning, such as 'implied dismissal' or even 'circumstantial dismissal' may well be coined and used. But all these could not go beyond the common law test.

Turning back to our case under appeal, it is not enough for the learned judge in the court below to say that constructive dismissal has no application to the interpretation of section 20 of the Industrial Relations Act. He must go further and say which of the two alternative views on constructive dismissal has no application and if so, why? Whilst we think that 'constructive dismissal' with the unreasonableness test does not apply, it will be wrong for anyone to hold that 'constructive dismissal' with the contract test does not apply. Perhaps in the context of our law, it is better that we do not use the terminology at all.

When the Industrial Court is dealing with a reference under section 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and it so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concept to the U.K. legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from paragraph (c) of section 55(2) of the U.K. Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word 'dismissal' in our section 20. We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd.* [1970] 1 Lloyd's Rep. 486).

In *Bouzourou's* case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan's* case, the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

Finally, his Lordship Salleh Abas LP rounded up his judgment by saying (see pp. 96 to 97 of the judgment):

Looking at the award, it is clear to everyone that the Industrial Court in coming to the conclusion that the appellant was dismissed did not misdirect itself in law. The court only spoke of constructive dismissal in the context of the contract test. It never even made any reference to the unreasonableness test. This is made clear by the following passage at page 9 of the award:

> Past cases of constructive dismissals dealt with by this court ... are agreed that whether or not there has been constructive dismissal is to be determined by the contract test: that is, did the employer's conduct amount to a breach of contract which entitled the employee to resign? And did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken place.

(Otherwise he would be regarded as having elected to affirm the contract and would lose the right to repudiate the contract, ie, to treat himself as discharged).

(The words in brackets are ours).

We accept this passage to be the correct statement of the law. The questions asked by the Industrial Court in fact are similar to that part of the judgment of Lord Denning M.R. in *Western Excavating's* case where the learned Master of the Rolls set out the contract test. Only in those circumstances can an employee be held to be constructively dismissed and that is what constructive dismissal is.

The Industrial Court applied this test to the facts which it had found in the case and before coming to the conclusion that the appellant was dismissed, it examined the evidence and dealt with the issues before it very carefully and most admirably. We cannot see how its award therefore could be open for quashing by the High Court. So long as the Industrial Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable.

In *MPH Bookstores Sdn Bhd v. Lim Jit Seng* [1987] ILR June 585, the Industrial Court applied the decision of Salleh Abas LP in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (supra)* and dismissed the claimant's claim. This was what the Industrial Court said (see p. 585 of the report):

> 1. For a claim of constructive dismissal to succeed both limbs of the common law contract test must be present, i.e. firstly, did the employer's conduct amount to a breach of the contract of employment going to the root of the contract or had he evinced an intention no longer to be bound by the contract, thereby entitling the workman to resign? Secondly, did the workman make up his mind and act at the appropriate point in time soon after the conduct of which he had complained, had taken place?
>
> 2. If the workman continues in employment without demur it is fatal to a claim of constructive dismissal at a later date for then the workman would be taken as having waived the repudiation by the employer and thus forfeited his right to claim constructive dismissal. This is the position in the Claimant's case and for this reason alone his claim of having been dismissed fails.

In *Pexxon Sendirian Berhad v. Sia Qui Yau, Johore* [1989] 1 ILR August 235, the Industrial Court once again applied the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (supra)* and concluded as follows (see p. 240 of the report):

> So the length of time is a crucial factor by which the Claimant must act to repudiate the contract based on the breach, that goes to the root of that contract. The period of one month has been held to be unreasonable for the Claimant not to have acted against his employer. It seems that once an employee has discovered that there is substantial breach or breaches of employment that goes to the root of the contract of the employment he must so act immediately either by protesting or giving notice to the employer and walking out of the job, otherwise he might be said to have affirmed the new term of the contract, thereby accepting it with the terms added. All this is to be decided on the facts of each case.
>
> The facts of this case are that the exhibit CL. 1A is dated 17th July 1986 and the exhibit CL. 2 (the reply by the Claimant) is dated 23rd August 1986, and it is clear that almost one month and one week had lapsed. The Claimant is a businessman with some degree of the knowledge of the world, and he has not given evidence any reason why this delay, therefore from the circumstances of this case the court can assume that the Claimant had affirmed the new items to be introduced by his employer and he cannot come to court now to say that he claims for constructive dismissal.

In *Ang Beng Teik v. Pan Global Textiles Bhd, Penang* [1996] 3 AMR 2941, Gopal Sri Ram JCA had this to say at p. 2954 of the report:

> As we have said, in order for section 20(1) to bite, a workman must consider himself to have been dismissed without just cause or excuse. As demonstrated, he may treat some conduct on the part of his employer towards him-conduct that falls short of actual dismissal or termination – as amounting to a dismissal. It may, as in the illustration earlier given, be an order of demotion. Or it may be an order of transfer. The workman in question may consider his demotion or transfer as being the same as a dismissal. In the words of the Act, he 'considers that he has been dismissed'. But there has been no formal dismissal or termination. Yet the workman may have recourse to section 20. If it were not so, an employer can make a workman's life so intolerable so as to force him to resign and then boldly say that there was no dismissal. Even the common law recognises that a dismissal may be disguised as a resignation. See, *Stanley Ng Peng Hon v. AAF Pte. Ltd* [1979] 1 MLJ 57.
>
> Where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse, lawyers term such conduct as 'constructive dismissal'. There is no magic in the expression. It is only a convenient label to describe the kind of conduct we have referred to. It could be an order of transfer or of demotion. Or it could be that the workman has been made redundant by the employer. Or it may be a case where the workman is asked to retire. The categories are not, we emphasise, closed.

Again in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79, Gopal Sri Ram JCA remarked at p. 92 of the report:

> No useful purpose will be served by saying whether the respondent was 'constructively dismissed'. The phrase constructive dismissal is a mere label. It does nothing to clarify matters. On the other hand, it causes confusion. It is better that the phrase be not resorted to at all: *Ang Beng Teik v. Pan Global Textile Bhd* [1996] 4 CLJ 313. Unfortunately the Industrial Court paid too much attention to it. That is why it went wrong – in the jurisdictional sense.

In my judgment, the doctrine of constructive dismissal is here to stay. It is not a mere label coined to benefit the employee in an industrial dispute. It is a doctrine that gives life to an employee who has been dismissed without just cause or excuse. It is a doctrine that existed since time immemorial and has been adopted vigorously by the then Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (supra)*. This doctrine hinges on the contract test as elucidated by Lord Denning in *Western Excavating (ECC) Ltd v. Sharp (supra)*. In a broad sense constructive dismissal occurs when an employer repudiates a contract of employment. The repudiation may take the form of a breach, anticipatory breach or notice of intention. It may be express or implied and it must go to the substance of the contract.

If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract. It can safely be said that one term which, if not express, may be implied in a contract of employment and it is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract. What has to be ascertained is whether in all the circumstances of the case the responsibilities and duties of the employee have been so altered by the employer as to constitute a breach of a fundamental term of the contract of employment (See *Orth v. Mac Donald Dettwiler & Associates Ltd* [1986] 16 CCEL 41 at 55, 60; 8 BCLR (2d) 1 (CA) and *Lesiuk v. British Columbia Forest Products Ltd* [1986] 15 CCEL 91 at 102, 8 BCLR (2d) 297, 33 DLR (4th) 1 (CA)). Lambert JA in *Farquhar Butler Brothers Supplies Ltd* 23 BCLR (2d) 89 defined constructive dismissal in this way (see p. 92 of the report):

> A constructive dismissal occurs when the employer commits either a present breach or an anticipatory breach of a fundamental term of a contract of employment, thereby giving the employee a right, but not an obligation, to treat the employment contract as being at an end ...

In *Nicholls v. Air Products Canada Ltd* [1991] Rep. Oct. 1109 at 1115, the court said:

> ... in order for (the doctrine of constructive dismissal) to apply, the employer must have unilaterally changed a term or condition of ... employment. To amount to a constructive dismissal, the change must affect a fundamental term of the employment contract. Changing an employees remuneration, benefits, job content, job status, job duties, or demoting the employee, are examples of situations which could lead to a finding of constructive dismissal.

These principles of law serve as useful guidelines in determining the present case. It was incumbent on the applicant's part to establish that the second respondent committed a fundamental breach which went to the very root of the applicant's contract in offering the applicant the post of warehouse and distribution manager – the same position held by the applicant in the first respondent before the business was sold to the second respondent. Then if there had been such a breach – here, of course, the second respondent argued through their learned counsel that there was no such breach, the pertinent question to pose would be whether the applicant left soon after that breach had occurred. All the authorities clearly showed that the length of time was a crucial factor to reckon with, a factor wherein the applicant must act swiftly in order to plead constructive dismissal. In *Pexxon Sendirian Berhad v. Sia Qui Yau, Johore (supra)*, the Industrial Court rightly and correctly ruled that a lapse of one month and one week was sufficient to deny the claimant's claim

for constructive dismissal. The hearing before the Industrial Court took two days as seen in the annexure to encl. 4 and at the end of it the applicant's claim that he was constructively dismissed by the second respondent was rejected.

Mr. Gana Muthusamy, the learned counsel for the applicant, attempted to review the merits of the award by the Industrial Court when he raised the issues of the temporary nature of the secondment, affirmation of the contract, objective of the secondment and whether there was indeed a demotion. As a review court it is a taboo for this court to go into the merits of the case. It is pertinent to point out that the Industrial Court had found for a fact that:

(a) the applicant accepted his assignment for 6½ months without advancing any verbal or written complaint of any alleged reduction of duties (see p. 28 of encl. 5).

(b) the applicant's explanation that he thought that the assignment was temporary was unacceptable to the Industrial Court because if the applicant considered the post was indeed a demotion *albeit* temporary in nature, the applicant would not have accepted or stayed on during the relevant period of the assignment (see p. 28 of encl. 5).

(c) the applicant attended a course in warehouse management and consequently he had some knowledge in that field and the Industrial Court held that the assignment was therefore a natural follow-up of the experience and training that the applicant had received (see p. 29 of encl. 5).

(d) it was never indicated to the applicant that he would revert back to his former post of production manager and although the applicant was expressly told to see either Mr. Ooi or Mr. Gopinath if he wished to discuss the assignment further yet the applicant saw it fit not to do so (see p. 29 of encl. 5).

Flowing from these, the Industrial Court came to a finding of fact that the post of warehouse and distribution manager was not a demotion and that the applicant's designation as a warehouse and distribution manager did not amount to a breach of any of the terms of the contract of employment. The Industrial Court found it easy to conclude and did conclude that there was no repudiation of a fundamental term, be it expressed or implied, of the applicant's contract of employment that would entitle him to consider himself constructively dismissed. I must at once point out that the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 MLJ 317 especially at p. 342 thereof rightly declares and enunciates the present state of the law:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

This very passage receives the approval of the Federal Court in the case of *Hon Kiang Ngan v. Mahkamah Perusahaan, Malaysia (supra)*. The applicant somehow failed to show nor disclose any error of law committed by the Industrial Court in the course of its deliberation. In my judgment, the Industrial Court had applied the correct test in regard to the law of constructive dismissal when coming to its decision.

I could not help but observe that the applicant was conveniently blowing hot and cold. On the one hand the applicant alleged that the first respondent remained his employer during his assignment as warehouse and distribution manager to the second respondent, but on the other hand the applicant alleged that by the end of his secondment and at the time when the second respondent had bought over the first respondent and offered him the post of warehouse and distribution manager, the applicant rejected the *bona fide* offer by the second respondent on the sole ground that he should be offered the position of production manager notwithstanding the fact that the applicant no longer enjoyed that position in the first respondent. Mr. Thavalingam Thavarajah, learned counsel for the second respondent, drew the court's attention to the letter dated 20 August 1992 which had been reproduced in the early part of this judgment and argued, quite correctly, that the applicant held the post of warehouse and distribution manager in the first respondent before he was assigned to the second respondent. In my judgment, the applicant cannot be allowed to have his piece of cake and eat it at the same time. There was evidence emanating before the Industrial Court that the second respondent made a genuine offer to all the employees of the first respondent including the applicant and the offer to the applicant took into account two salient factors:

(1) the applicant's last position with the first respondent prior to his secondment was that of warehouse and distribution manager; and

(2) the applicant had the requisite qualification for the simple reason that he had served in that capacity with them for over 6½ months.

A perusal of the Industrial Court's award, particularly at pp. 20 to 23 of encl. 5 revealed that the Industrial Court had applied the correct principles of law relating to constructive dismissal. Of pertinence to point out would be the Industrial Court's application of the contract test as laid out by the then Supreme Court in *Wong Chee Kong v. Cathay Organisation (M) Sdn Bhd (supra)*. The Industrial Court too found as a fact that the applicant had remained in the capacity of warehouse and distribution manager on a higher scale without a whimper of objection for over six months and by this conduct it would vitiate any claim which the applicant may have against both the respondents. It is interesting to note that Mr. Ooi Hun Chuan testified that the scale of operations of the second respondent was much bigger and not as alleged by the applicant. This piece of evidence can be seen at p. 16 of exh. "GM 1" of encl. 4 and it remained unrebutted before the Industrial Court. It is significant to highlight the contention of the applicant that he thought that his transfer to the second respondent was temporary; but alas this was not pleaded in the statement of case as seen in encl. 5. On this point, I need to refer to the decision of his Lordship Eusoff Chin, Chief Justice of Malaysia in *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where at p. 162 of the report, his Lordship lucidly said:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider. In this case, the Industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it is not bound, and therefore, not obliged to consider the issues of bias and misconduct.

In my judgment, the applicant had failed to discharge the burden of proving that he had been constructively dismissed by the second respondent and I hold unreservedly that the Industrial Court was correct in dismissing the applicant's claim. Even assuming for one moment that there had been a breach by the second respondent, which did not happen here, the applicant's delay of 6½ months as conceded by him during cross-examination, was tantamount to an affirmation of the alleged breach and the applicant was therefore precluded

from claiming that he was constructively dismissed. I am reluctant in exercising my supervisory jurisdiction over inferior tribunal to interfere with the findings of that tribunal especially when the tribunal, just like the present case, had applied the right test and came to a finding of fact which in all the circumstances was not perverse. I am fortified in my view by the decision of the then Federal Court in the case of *Goon Kwee Phoy v. J.&P. Coats (M) Bhd* [1981] 2 MLJ 129, where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said at p. 136 of the report:

> In the instant case, the High Court entirely agreed with the Industrial Court that there was no redundancy. Indeed, it could not do otherwise on the evidence. But even assuming for the moment that the High Court would be correct in disagreeing with the Industrial Court on what is essentially a finding of fact and disregarding the ouster provisions in the Act, we would adopt the words of May J in *London Transport Executive v. Clarke* [1980] ICR 532, 538-539:
>
> > ... though we may disagree with it as a matter of fact, (we do not think) it can be upset on appeal by this appeal tribunal. We think it of prime importance in these cases that, unless it can be demonstrated that the industrial tribunal has gone wrong in law, this appeal tribunal should uphold the decisions of industrial tribunals who after all are there, as the Court of Appeal has said, to decide these very things; and the whole purpose, efficacy and informality of industrial tribunals, just as with so many other domestic tribunals that exist in modern society, would be undermined completely, if after a minute examination, as it was described in one case, the appeal tribunal was prepared to disturb decisions of industrial tribunals which otherwise did not err in law.

All the principles of law referred to in this judgment must be read in the context of the facts of each case. The facts here favoured the second respondent as found by the Industrial Court. The applicant suffered no real injustice and I am constrained not to order *certiorari*. Enclosure 2 must therefore be dismissed with costs.